No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by the Southern Division of the United States District Court for the Northern District of California. The offenses charged in the indictment are violations of the Jones-Miller Act, 21 U.S.C. 174 and are punishable by imprisonment for a term exceeding one year. This Court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

OFFENSES CHARGED, PLEA AND OUTCOME.

Appellant was charged in an indictment, jointly with two other defendants, Joseph Tocco and Joseph

Barri, in two counts, with violations of the Jones-Miller Act, to-wit: (1) the unlawful concealment and facilitating the concealment of opium and (2) facilitating the transportation of the same opium (T. R. 2). Only appellant had a trial by jury, defendant Tocco having entered a plea of guilty to one count of the indictment, and the defendant Barri being a fugitive. Upon the trial appellant was found guilty on both counts of the indictment (T. R. 11). Motions in arrest of judgment (T. R. 13) and for a new trial (T. R. 15) were denied (T. R. 17); whereupon appellant was sentenced to imprisonment for a term of ten years and to pay a fine of $5000 *on each count of the indictment, the sentences to run consecutively* (T. R. 17, 18). Appellant filed his notice of appeal (T. R. 18), supported by grounds of appeal (T. R. 20) followed by assignment of errors (T. R. 22) and additional and amended assignment of errors (T. R. 189).

STATEMENT OF FACTS.

Substantially, the facts of the case are:

Appellant, 53 years of age, lived in Santa Cruz, California, a beach resort, with his wife and four children, three girls ages 10, 20 and 21, and a boy 22 for the past five years an enlisted man in the U. S. Navy. Appellant had established his home in Santa Cruz following his release from a Federal prison in October, 1937, having served two years on a charge of conspiracy in connection with counterfeiting. He was occupied as a gardener and a concessionaire on

the board walk at the beach. He and his nephew operated three game concessions. In the winter time appellant did gardening work and in the summer time busied himself with his board walk concession (T. R. 158). The hours of work at the concession were usually from 9 in the morning until late at night, depending upon the crowds (T. R. 47). Appellant and his family resided in an old ten-room house valued at about $5000 owned by appellant's wife and left to her by her deceased mother. Appellant's son owned an Oldsmobile automobile and his nephew a 1936 Chevrolet automobile. On his return from the South Pacific the son purchased for himself a Pontiac automobile and permitted appellant, his father, to use the Oldsmobile automobile which was run down. Besides his family, appellant's brother, nephew and a Coast Guardsman lived and boarded at his home (T. R. 159), the Coast Guardsman having lived there for a year and a half and the brother and nephew during the entire time appellant lived in Santa Cruz (T. R. 160).

Appellant first met a man named Lagaipa about March or April of 1943 on the board walk in Santa Cruz. Lagaipa was looking for a concession for himself (T. R. 160) and bought a place serving food, beer and sandwiches; however, he sold the business before opening it up and later opened up a saloon and small hotel in Santa Cruz. Appellant patronized Lagaipa's business and so became friendly with him. Lagaipa stayed at appellant's house for a couple of months, ate there frequently and paid $12.50 a week for board and room. Both appellant and Lagaipa were of Italian

descent and spoke Italian. Appellant and Lagaipa became quite friendly, going out together, to shows together, and traveling occasionally to San Francisco together. Members of appellant's family also went out and to shows with Lagaipa. Subsequently Lagaipa brought his family, consisting of his wife and three children, to Santa Cruz, whereupon Lagaipa lived with his family, at first in a hotel and later in a home he purchased; the two families frequently exchanged visits. On the day that Lagaipa's family arrived from the east, appellant tended Lagaipa's bar for him so that Lagaipa could go to meet them (T. R. 161). Appellant did not know Lagaipa or anything about him prior to his coming to Santa Cruz (T. R. 162).

Appellant first met the co-defendant Tocco in Santa Cruz around November, 1943, at Lagaipa's saloon, having been introduced to him by Lagaipa who represented Tocco to be his friend from the east. At the same time appellant was introduced to Lagaipa's brother-in-law. Tocco was apparently trying to buy Lagaipa's saloon and had come there for that purpose. Tocco lived at appellant's house for about a week and departed, returning to Santa Cruz in March, 1944, at which time Lagaipa brought him to appellant's house seeking a room for him. Appellant provided a room for him and Tocco remained a couple of weeks without charge and left, returning to Santa Cruz a third time near July, 1944. He came to appellant's house inquiring for Lagaipa. Appellant informed Tocco that he had not seen Lagaipa for a long time (T. R. 162).

Lagaipa dropped out of sight the end of May or the first of June (T. R. 48-134) and hasn't been heard of since.

Tocco again stayed at appellant's house until about the end of July. Appellant understood his business at Santa Cruz to be that of buying tomatoes and olive oil. By this time Tocco had become friendly with appellant and his family and they frequently went out together. Tocco also was of Italian descent and spoke Italian.

Appellant first met the co-defendant Barri around the end of July, 1944, having been introduced to him by Tocco on the Boardwalk. Tocco represented to appellant that Barri was sick with rheumatism and required sun baths, also that he was from the east. Tocco requested sleeping accommodations for Barri at appellant's house, and appellant permitted him to sleep with Tocco. In this manner Tocco and Barri remained at appellant's house for about two or three days, after which they rented a cabin in the Santa Cruz Mountains. Appellant and his family visited them there a few times and continued friendly relations with them (T. R. 163). On one occasion appellant drove Tocco and Barri to San Francisco with some grips. Appellant happened to be going to San Francisco to buy groceries for the family, usually going to San Francisco about once a month for said purpose and also to obtain merchandise for his concession. Just prior to this particular trip appellant was advised that Tocco and Barri intended taking a bus to San Francisco and suggested that if they waited

until Wednesday he would then be going to San Francisco and would take them there with him (T. R. 164).

Federal narcotic agents took up residence in Santa Cruz as early as March, 1944, for the purpose of carrying on an investigation of the activities of certain persons suspected of dealing in narcotics. Appellant was kept under surveillance by the agents (T. R. 121 and 133, 134). Lagaipa was under surveillance by the agents from and during the time he left New York, arrived in Santa Cruz and remained there. Tocco and Barri were also kept under surveillance (T. R. 134).

Benedict Pocoroba, a federal narcotic undercover agent, residing in Chicago, Illinois, arrived in Santa Cruz, California on May 1, 1944, pursuant to orders of superiors in the Bureau of Narcotics (T. R. 25). He was transferred to Santa Cruz to do undercover work in connection with the investigation being carried on there by the Federal Narcotic Division. There he met other federal narcotic agents. Assuming and using the name of Benedict or Benny Vicari, to cover up his real identity, Pocoroba commenced his work. Being of Italian descent and speaking Italian Pocoroba was ideally suited for the task (T. R. 42).

Shortly after arriving in San Francisco, en route to Santa Cruz on his new assignment, Pocoroba was advised of the activities of Lagaipa who recently arrived in Santa Cruz from New York and was known to have trafficked in narcotics in New York for a long period of time. He was also told about Tocco, who likewise was from New York. Pocoroba was informed that Lagaipa was then living in Santa Cruz and was ac-

quainted with appellant and had received his mail at appellant's house, and also that Tocco was acquainted with appellant (T. R. 42). Lagaipa was known to have a long criminal record in New York involving narcotics. Pocoroba announced his purpose, in going to Santa Cruz as undercover agent, was to conduct an investigation of people who were under suspicion of trafficking in narcotics and to make purchases of narcotics from suspects if possible.

On arriving in Santa Cruz, Pocoroba registered at the Greystone Hotel under the assumed name of Vicari and from that time on was known to everybody he contacted by that name. On being advised that appellant had a concession on the board walk, Pocoroba went there to look for him. At that time Pocoroba knew that Lagaipa was in Santa Cruz and that he and appellant were friendly (T. R. 44, 45).

Pocoroba first met appellant at his concession on the board walk on May 7, 1944 (T. R. 26, 45). He went to appellant's concession for the purpose of striking up a conversation and becoming acquainted with him and to work into his confidence. He had along with him his son (T. R. 45) an instructor pilot in the Air Force (T. R. 51) and some of his son's fellow officers (T. R. 45) who played the games at appellant's concession. His son and fellow officers made a special trip to Santa Cruz from Merced, California, for the purpose of assisting in this way (T. R. 45). Pocoroba came to the concession frequently, at least several times a week, and succeeded in obtaining the confidence of appellant; so well did he succeed that he was

soon eating at appellant's house on an average of twice a week (T. R. 45). At times he even assisted appellant at the concession, picking up rings and working right along with him (T. R. 47). He made many representations to appellant in order to instill confidence and to cement a friendship. Among other things he told appellant he was in an accident (T. R. 45), had injured his mouth or jaws and had difficulty eating (T. R. 46). This prompted appellant to invite him to his house for home cooked food. The friendship grew between Pocoroba and appellant and his family; they went to shows together and made trips to San Francisco together. Appellant's children called Pocoroba "Uncle Benny" and played with him (T. R. 46, 166). Pocoroba also told appellant he had a son who was in the Air Force and stationed at Merced and that he visited him on weekends (T. R. 46). Once a week Pocoroba bought a chicken and appellant's wife prepared it for him. In the beginning he had asked appellant if he could board at his home. He was treated like one of the family (T. R. 46). Several times appellant took Pocoroba with him to San Francisco (T. R. 166).

One day Pocoroba talked to appellant about his income. Lots of times he would talk to appellant about money, telling him how much he had and was receiving. He said he was getting about $500 a month income out of real estate (T. R. 46, 166, 167), whereupon appellant was prompted to say: "You lucky—you got nothing to worry about—I wish I have that much myself, but I am not so lucky" (T. R. 167).

A conversation between Pocoroba and appellant concerning narcotics developed. Pocoroba first mentioned the subject to appellant in explaining his income and the good financial condition he was in, but appellant paid no attention to it (T. R. 167). Pocoroba kept bringing up the matter of narcotics, obviously in an effort to lead appellant on, and later asked appellant if he knew where narcotics could be procured. Appellant told him he would not have anything to do with narcotics because of his previous trouble and that he had his family to look out for (T. R. 167). Appellant did not know that Tocco, Barri or Lagaipa had ever had anything to do with narcotics and would not have permitted himself or his family to associate with them had he known they were connected with narcotics in any way (T. R. 167, 168).

Pocoroba testified that the subject of narcotics came up when appellant told him he had been convicted for counterfeiting in 1935 and commented that "the counterfeiting racket was lousy, the only ones that made money were the ones that printed the money" and that he would sooner deal in narcotics than in counterfeit money. He maintained that appellant was the first one to mention narcotics and did not recall what brought the discussion up (T. R. 48). In this connection Pocoroba testified that appellant asked him what heroin sold for in the east and inquired if a can of opium would make an ounce of heroin, and that appellant suggested to him that he write his friends in Chicago to see if he could make a connection (T. R. 27, 28). However, Pocoroba admitted that it was his

duty as an undercover agent to talk about narcotics while working on the case and that he talked to appellant daily about various rackets (T. R. 48). Appellant expressed envy at Pocoroba's income and observed that he was just a poor man and had a big family to take care of and wondered how Pocoroba did so well (T. R. 49). This prompted Pocoroba to inform appellant that he used to be in the narcotic racket in New York and that is where he used to make his money. Pocoroba admitted telling appellant this in order to gain his confidence. It was then that further discussion was had about narcotics (T. R. 49). Pocoroba let appellant believe that he had dealt in narcotics in a substantial way before in New York and that he was a sizeable narcotic dealer, all in order to further instill confidence in appellant (T. R. 49, 50); further that he used to import narcotics from Germany and used to have someone on the boats who would pay off and take care of things for him on the boats; also that he had a good narcotic contact in Chicago and that if appellant had narcotics that he had this good narcotic contact in Chicago who could take it off his hands. He had in mind appellant being the source of supply and disposing of it in Chicago or Texas or some other place. He also let appellant know that he had written letters relative to the disposal of narcotics and showed appellant a letter supposed to be in answer to the letter he had sent (T. R. 50).

Pocoroba informed appellant that his son was flying to different parts of the country and suggested that he could fly to Mexico and bring back some narcotics

if appellant could obtain it there, whereupon appellant replied he would have nothing to do with it (T. R. 168). Pocoroba maintained that this plan was suggested by appellant (T. R. 51, 52) but that the head of his department would not sanction it (T. R. 51, 52).

Pocoroba talked to appellant about narcotics on several occasions. Appellant would have nothing to do with narcotics and finally this type of conversation ceased and was not revived until about an hour and a half or two hours prior to appellant's arrest (T. R. 169) on Wednesday, August 16, 1945 (T. R. 109 and 173-4).

On August 9, 1944, appellant drove to San Francisco for supplies and was accompanied by Tocco and Barri who were leaving for the east (T. R. 52, 163, 164). Appellant was informed by Tocco and Barri that they were to get reservations in San Francisco for the east (T. R. 164). Federal narcotic agents trailed appellant's car to San Francisco and observed the activities of appellant, Tocco and Barri while in San Francisco (T. R. 89). Appellant's first stop in San Francisco was at a place on 24th Street near Van Ness where he got out of his car and went into a building and remained there about twenty minutes (T. R. 89). The building was a sort of warehouse and an olive oil place (T. R. 96) where appellant ordered some Italian oil (T. R. 164). Returning to the automobile appellant then drove on, stopping on Geary Street between Powell and Stockton where Tocco got out. Appellant then drove away with Barri still in the car.

Tocco went into a Santa Fe ticket office and soon after rejoined appellant and Barri at a bar operated by a friend of appellant's named Scambellone on Grant Avenue (T. R. 99 and 164).

Barri and Tocco had brought along two pieces of luggage which were clearly visible inside the car at all times (T. R. 90 and 123). Barri and Tocco were unable to get reservations and asked appellant if he had some friend who could keep the suitcases for them until they were able to get reservations for the east. Appellant had another friend, a taxicab driver he has known for twenty years, take the luggage to Scambellone's apartment (T. R. 164, 165 and 100). Scambellone supplied appellant with the key to his apartment and appellant returned the key to him after the taxicab driver took Tocco and Barri's luggage to Scambellone's apartment. Appellant did not go to the apartment himself (T. R. 83, 84). Later in the afternoon appellant was seen by an agent walking from the direction of Scambellone's apartment back towards his bar, a distance of two and a half or three blocks (T. R. 91). Appellant then went about purchasing groceries to take home to Santa Cruz, also stopping at a macaroni factory on Pacific Street to buy some spaghetti. After making these purchases appellant returned to Scambellone's bar, had a couple of drinks, said good-by and returned alone to Santa Cruz (T. R. 165 and 97).

In the evening after appellant had left for Santa Cruz, Tocco went to a theater, after which he went

to the Whitcomb Hotel on Market Street where he was seen with Barri (T. R. 91).

On the following day, Thursday, August 10, Tocco left the hotel between 8 and 9 o'clock in the morning, went into a coffee shop later into a bar, and then to Scambellone's bar on Grant Avenue (T. R. 91). On the same day about noon Tocco and Barri were seen coming out of the Whitcomb Hotel, and from there to the Greyhound Bus Station at 5th and Mission Streets, walk around town together and later take a street car to the North Beach section. Tocco walked up to Scambellone's bar on Grant Avenue while Barri stood on the corner watching Tocco. Barri then walked rapidly up Broadway, entered a theater and remained about ten minutes, emerging without a hat. He was watching behind him and looking up and down the street, finally catching a street car. When Barri entered the theater he appeared to have observed someone. He was later seen to board a bus for Santa Cruz at about 5:20 P.M. at the bus station at 5th and Mission Streets (T. R. 92).

Two days previously, on August 8th, agents observed Tocco and Barri leave appellant's house in Santa Cruz at about 11:50 A.M. and go to a stationery store (T. R. 94) where they purchased four large sheets of brown wrapping paper and one large roll of brown gummed paper tape (T. R. 85). The agents did not follow Tocco and Barri after they left the store to see where they took the packages (T. R. 95).

When appellant returned to Santa Cruz he saw Pocoroba and asked him if Tocco or Barri returned

to Santa Cruz if they could stay in his cabin (T. R. 32). He had received a phone call previously from Tocco stating that he had missed Barri and was worried about what happened to him. Tocco asked appellant to tell Barri to call him if he saw him. Appellant gave this message to Pocoroba and asked him to let Tocco know if he saw Barri. Tocco did not say he was coming back to Santa Cruz (T. R. 169, 53).

Pocoroba gave permission for Tocco or Barri to use his cabin, and upon immediately returning to his cabin he found that Barri was already there (T. R. 53 and 33).

Barri was nervous and afraid to go out the door and asked Pocoroba to have appellant get in touch with somebody in San Francisco to see that Tocco got safely back to Santa Cruz. Appellant gave Pocoroba a telephone number to call which was the number at Scambellone's bar on Grant Avenue in San Francisco, appellant being too busy working at the concession at the time and not having the opportunity to phone himself. Barri wanted to phone to Tocco in San Francisco to tell him to bring back the suit cases to Santa Cruz.

Tocco and Barri gave up their quarters in the Santa Cruz mountains on August 6th and returned to appellant's house. Barri stayed with Pocoroba in his cabin from August 10th until the morning of August 13th. Tocco stayed in Pocoroba's cabin from the night of August 11th to the early morning of August 13th. Previous to this time Tocco frequently used

Pocoroba's cabin to dress and undress for the beach (T. R. 54).

Pocoroba had previously met Tocco about July 6, 1944, at appellant's house (T. R. 28) and met Barri on July 21st on the Boardwalk where he was accompanied by Tocco, Tocco introducing Barri to him (T. R. 29).

Pocoroba testified that on Thursday evening, August 10th, appellant came to his cabin about 11 o'clock; that Barri was present and told appellant he had been followed while in San Francisco and further said: "That is not the proper thing to do, to take me to a strange city, put me on a hot spot and let the police look me over"; that appellant answered that he was crazy, that he did not know what he was talking about, that he had taken him among friends, and that nobody had followed him; that Barri then replied: "Listen, I am from New York, and I know when I am being followed. You don't have to tell me"; that Barri further said: "Furthermore, what good did it do to bring the grips to your friend's house when he would not give me permission to load the stuff?"; that appellant replied that he had been in too much of a hurry, that he was nervous and excited, that there would have been other ways of loading the stuff; that appellant then said: "I had the man bring the stuff in San Francisco and from San Francisco he has to bring it here"; that Barri then said: "Well, we don't do business like this in New York. Whenever we have a stranger in New York for business purposes we always look after his safety"; that appellant then

left the cabin and Barri remained there all night (T. R. 33).

Appellant denied that any such conversation took place (T. R. 170).

On Friday evening, August 11th, Tocco came to Pocoroba's cabin with three pieces of luggage (T. R. 33, 34).

Two pieces of luggage were identified as the same luggage Tocco and Barri took with them to San Francisco a day or two previously which appellant left for their convenience with his friend Scambellone (T. R. 34).

Barri was in the cabin. Tocco and Barri slept in Pocoroba's cabin that evening. On the following morning, Saturday, August 12th, appellant came to the cabin shortly after 9 o'clock. Pocoroba testified a conversation then took place and that appellant said to Barri: "The man is here again and I have already given him the money. Now it is entirely up to you. You take the stuff or they will dump it in the ditch"; that Barri then said: "I don't know how you people do business in California. * * * Where do you expect me to pack this stuff, in the street? Your friend in San Francisco won't give me permission to pack it in his house; you won't give me permission to pack it in your house. What am I to do?"; that appellant then got up and said: "I am going to work. Think it over and let me know" (T. R. 34, 35). Appellant also denied that this conversation took place (T. R. 170).

Pocoroba further testified that at about 5 o'clock in the afternoon of the same day, Tocco asked permission to pack the opium in his cabin and that he granted it; that Tocco then left and returned in about ten or fifteen minutes; that Barri was in the cabin at the time; that after 11 o'clock the same evening, while Tocco and Barri were still in his cabin with him, appellant came in carrying a pasteboard box covered by a newspaper, giving it to Tocco who placed it on the floor; that appellant then went away and came back in a few minutes with another box of about the same size, also wrapped in a newspaper, which Tocco received; that appellant then departed, after consuming a drink; that as he left appellant said to Tocco: "I will pick you up at 5 o'clock."

On this point Pocoroba's testimony varied. He first testified appellant said: "I will pick you up at 5 o'clock" (T. R. 35). Later he testified, "Just at 5, something like that" (T. R. 56 and 79).

The cartons which Pocoroba claimed appellant brought into his cabin were covered and not disturbed nor contents removed until appellant left the cabin shortly after (T. R. 55).

Pocoroba claimed he knew what was in the two cartons because Barri told him he had come to Santa Cruz and laid out $22,000 for 100 cans of opium; that he gave $22,000 to appellant for the purchase of the opium (T. R. 61); that Barri further told him he had given appellant $22,000 in $1000 and $500 bills for the purchase of 105 cans of opium, and that he had been followed by detectives in San Francisco and had no intention of doing any business (T. R. 74).

Appellant admitted going to Pocoroba's cabin after 11 o'clock that evening, but asserted that he remained there only a few minutes. He testified that he was working at his concession and stopped by for a drink as he was accustomed to frequently doing; that he saw Tocco and Barri in the passageway outside the cabin with some kind of a box and went into the cabin with them; that after the drink he went back to work at his concession (T. R. 170, 171).

Pocoroba testified that appellant did not wear gloves when he carried the cartons into the cabin (T. R. 155); examination for fingerprints did not reveal appellant's fingerprints on the cartons (T. R. 157).

Pocoroba further testified that after appellant left the cabin Tocco and Barri produced a scale, the brown colored wrapping paper and tape they had previously purchased in the store in Santa Cruz, and weighed the cans of opium that were concealed in the two cartons previously carried into the cabin by appellant and packed the packages into two suitcases; that Barri asked Pocoroba for some gloves, saying: "In the laboratory we always use gloves so that we don't leave any fingerprints in the cans or on the utensils"; that he did not have any gloves, but offered Barri a pair of new socks which Barri tried to use but found he couldn't do so (T. R. 35 to 37).

Pocoroba further testified that Tocco and Barri finished weighing and packing the cans of opium at about 1 o'clock in the morning (T. R. 37) and went to bed about 2 o'clock A.M.; that about 3:30 A.M. somebody wrapped at the door, that Tocco opened

the door and appellant said: "Let's get the grips and let's go"; that Tocco was dressed; that he had not undressed for the night, merely taking off his shoes; that Tocco then took the two pieces of luggage containing the cans of opium and left the cabin; that Barri remained in the cabin with him; and that later that morning he accompanied Barri to the bus station and had not seen him since (T. R. 38); that immediately after leaving Barri at the bus depot he endeavored to contact the other Federal Narcotic officers in Santa Cruz (T. R. 39).

Pocoroba testified that he did not see the person who knocked on the door of his cabin at 3:30 Sunday morning, August 13th, but could only hear a voice which might have been the voice of appellant (T. R. 65 and 79). He heard the person say: "Get your grips; let's go" (T. R. 65). In his later testimony Pocoroba erased any doubt in his mind that the voice was that of appellant, although he did not see the person (T. R. 79). Previously Pocoroba stated only that it sounded like appellant's voice and that he recognized it as appellant's voice (T. R. 77) and that it might have been appellant's voice (T. R. 79).

At that particular hour in the morning, neither Pocoroba nor any of the other agents observed what Tocco did or where he went from the time he left the cabin at 3:30 Sunday morning, nor who accompanied him, if anyone (T. R. 67).

Appellant denied being at Pocoroba's cabin early Sunday morning, asserting he was home asleep (T. R. 174). Appellant testified that he left his concession

around 2 A.M. Sunday morning, August 13th, and went home to bed; that at about 7 or 7:30 A.M. after getting up he went to the Boardwalk again to his concession to stock his shelves and remained there about an hour and a half, then returning home again, getting home about 9 or 9:15 A.M.; that he returned home in the Chevrolet automobile; that he had his breakfast and read a paper; that his wife had not returned home from Church yet; that about 10:30 he went back to his concession; that he met Pocoroba about 11:30 A.M. (T. R. 172, 173 and 39).

One of the agents, Maguire, testified that he was observing appellant's house on Sunday morning, August 13th, and that at about 9:15 A.M. he saw a Chevrolet automobile drive in to appellant's driveway leading to his home (T. R. 112).

Pocoroba hastened to contact the other agents which was done later in the day, and reported to them what had happened (T. R. 39). He and the other agents then went to contact the District Supervisor and departed for the Oakland Mole in an effort to locate Tocco on any train leaving for the east, but were unable to find him. Pocoroba then returned late Sunday evening to his cabin in Santa Cruz where he turned over to the other agents the two cardboard boxes and some brown wrapping paper and brown gummed paper tape (T. R. 39). The brown paper and brown gummed tape was the left over portion of the materials previously purchased by Tocco and Barri and used in wrapping the cans of opium (T. R. 40).

Pocoroba then returned to San Francisco on Monday and came back to Santa Cruz on Wednesday

afternoon, August 16th. He saw appellant at his concession on the beach at about 4 o'clock in the afternoon (T. R. 41), at which time Pocoroba asked appellant if he had heard from the boys and appellant replied: "No, if I don't hear from them again I would be glad. They are certainly lousy. Joe Tocco was introduced to me by a friend of mine, and the others were lousy." Pocoroba testified further that he asked appellant where he took Joe Tocco and that appellant said to Berkeley (T. R. 42).

Appellant denied such conversation took place; on the other hand asserted that Pocoroba at that time asked him if he could get him ten cans of dope and that he replied to him: "I don't need no help, I got no dope"; that Pocoroba then said: "Forget about it" (T. R. 174).

Pocoroba admitted that he asked appellant to get him ten cans of opium and that appellant replied that it was not his policy to deal in small amounts, but that he would do it for him for a price of $225 a can and that he would do it in about a week (T. R. 78).

This conversation took place on Wednesday, August 16th, just prior to appellant's arrest (T. R. 71); at about 6 P.M. the same day (T. R. 174). Pocoroba further admitted that appellant did not procure these or any other narcotics for him at this or any other time (T. R. 71); further that appellant was never seen to give anybody any narcotics or money for narcotics (T. R. 72).

Appellant denied that he knocked on Pocoroba's cabin at 3 or 3:30 the previous Sunday morning or that he drove Tocco to Berkeley (T. R. 174, 175).

Agent Newman left Santa Cruz on August 14th and departed for the east by plane and arrested Tocco as he got off the train coming into Chicago. Tocco's train had arrived from San Francisco (T. R. 126, 127). Tocco had with him the two suit cases observed by the agents previously in San Francisco and Santa Cruz at Pocoroba's cabin (T. R. 127) which contained a total of 95 cans of opium, a package of opium weighing a little over 8 ounces and 8 ounces of morphine in a sugar box (T. R. 128). The cans were wrapped in brown wrapping paper and sealed with brown gummed tape similar to the paper and tape purchased by Tocco and Barri previously in Santa Cruz and which Pocoroba observed Tocco and Barri using to wrap the packages previously in his cabin and turned over after Tocco's departure by Pocoroba to the other agents (T. R. 128, 129).

STATEMENT OF POINTS RELIED ON.

Appellant relies on the two following points:

1. The double jeopardy clause of the Fifth Amendment to the Constitution was violated by the verdicts finding appellant guilty on Counts 1 and 2 of the indictment and by the court ordering the sentences pronounced on each of said counts to run consecutively.

(Additional Assignment of Errors 10, 11, 12, T. R. 189-190.)

2. The evidence was insufficient to support either the verdict of guilty or the judgment and sentence on Count II.

(Assignment of Errors 1, 2, 3, 4, 9, T. R. 22-23.)

ARGUMENT.

1. THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION WAS VIOLATED BY THE VERDICTS FINDING APPELLANT GUILTY ON COUNTS 1 AND 2 OF THE INDICTMENT AND BY THE COURT ORDERING THE SENTENCES PRONOUNCED ON EACH OF SAID COUNTS TO RUN CONSECUTIVELY.

The assignment of errors filed herein specifies the foregoing points as follows:

> That the trial court erred in rendering judgment on each of the verdicts of guilty, finding defendant guilty on both counts one and two of the indictment, in that said counts of said indictment state facts constituting but one offense. (Paragraph 10, Additional and Amended Assignment of Errors, T. R. 189.)
>
> That the trial court erred in ordering the sentences, pronounced by the court in rendering judgment on counts one and two of the indictment, to run consecutively in that said counts of said indictment state but one and the same offense. (Paragraph 11, Additional and Amended Assignment of Errors, T. R. 189-190.)
>
> That the pronouncement of judgment upon both the verdicts finding defendant guilty on both counts of the indictment and ordering said sentences to run consecutively, constitutes a violation

of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States in that the facts stated in counts one and two of said indictment constitute a statement of but one and same offense. (Paragraph 12, Additional and Amended Assignment of Errors, T. R. 190.)

Count one of the indictment (T. R. 2) charges that the defendant did

> "* * * on or about the 12th day of August, 1944, at the City of Santa Cruz, State of California * * * fraudulently and knowingly did conceal and facilitate the concealment of a lot of smoking opium in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium," etc.

Count Two of the indictment (T. R. 2) charges:

> "That on or about the 13th day of August, 1944, at the City of Santa Cruz, State of California, * * * said defendants fraudulently and knowingly did facilitate the transportation of a lot of smoking opium, in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium," etc.

A mere reading of the two counts discloses that they refer to the same place, the same time and the same opium. They are based on the same statute.

The evidence discloses that the same identical tins of opium—and no others—are involved in both counts, that the same time and place is also involved and that

the events of the night of August 12th and early morning of August 13th constitute one continuous, unbroken occurrence. In other words, the events occurring at the times alleged in the indictment and disclosed by the evidence constitute but one indivisible offense.

Stripped of surrounding circumstances the events in question will be found in the testimony of the witness Pocoroba. Though appellant contradicts Pocoroba in many vital particulars, we will assume that the jury believed Pocoroba and here set forth his testimony as to what occurred at the times in question. It should be remembered that Pocoroba's testimony presents the facts in the light most favorable to the United States.

Pocoroba's testimony will be found in the transcript of record from page 34 to page 38 as follows:

> "On the following morning, Saturday, August 12th, Maugeri told Barri, 'The man is here again and I have already given him the money. Now, it is entirely up to you. You take the stuff or they will dump it in the ditch.' At that time Barri said, 'I don't know how you people do business in California.' He said, 'Where do you expect me to pack this stuff, in the street? Your friend in San Francisco won't give me permission to pack it in his house; you won't give me permission to pack it in your house. What am I to do?' Maugeri then got up and said, 'I am going to work. Think it over and let me know.' Maugeri then left the cabin shortly after 9:00 o'clock on that morning. About 5:00 o'clock in the afternoon of that same day Joe Tocco was in

my cabin, and he asked me for permission to pack the opium in my place. I agreed. Tocco then left the cabin, and returned in about ten or fifteen minutes. Barri was in the cabin with me at the time Tocco returned. The cabin consists of a combination living and bedroom, a kitchen and a bathroom. * * * After 11:00 o'clock on Saturday evening August 12th, Joe Tocco and Joe Barri and myself being present, Maugeri came into the cabin carrying a pasteboard box covered by newspaper. He gave it to Tocco, who put it on the floor. Maugeri then went away and came back a few minutes later with another box about the same size, also wrapped in newspaper and Tocco received it. I then mixed a drink and gave it to Sam Maugeri. He drank it in a hurry and went away. Maugeri had no conversation with Tocco or Barri at this time and place. When Maugeri left he said to Tocco 'I will pick you up at 5:00 o'clock.' * * * Tocco produced a small mail scale. They cleared the bureau of all the articles there were on it, and they placed the scales on the bureau, and Joe Barri started to weigh each individual can of opium, and Joe Tocco would mark down the weight. * * * They weighed each can separately and they marked the weight on a piece of paper, and then they started to wrap it in brown wrapping paper into bundles and tied the bundles with gummed paper tape and then put the bundles in the brown leather bag and the blue overnight bag. The big bag was then placed under the bed and the small bag on a chair. They finished weighing the cans around 1:00 o'clock, which would then be Sunday morning, August 13th. I went to bed at that time. * * * I retired in the single bed at about 1:00 o'clock and Barri

and Tocco did not retire until 2:00 o'clock. They occupied the double bed in my cabin. At about 3:30 somebody rapped at the door and Joe Tocco went to the door and opened it, and Sam Maugeri said, 'Let's get the grips and let's go.' Tocco was dressed; he hadn't undressed for the night, but he had taken his shoes off. Tocco then took the brown leather suitcase, Government's Exhibit 1 for Identification, and the blue overnight bag, Government's Exhibit 2 for Identification, and left the cabin. Barri and I remained in the cabin."

The evidence fails to disclose that Maugeri ever had possession of the pasteboard boxes at any time prior to 11 o'clock on the night of August 12th. The Government's evidence is silent as to any acts of Maugeri after 3:30 in the morning of August 13th. Thus, the testimony as to Maugeri's activities is limited to a continuous period of but four and one-half hours. The events during this period are as follows: At 11 P.M. Maugeri comes into the cabin (not Maugeri's cabin, but the cabin of Pocoroba) carrying two pasteboard boxes; after Maugeri left Tocco and Barri opened the boxes and removed the contents consisting of tins (these tins were unmarked and unopened, only the testimony of Pocoroba is to the effect that they contained opium); they weighed the tins, wrapped them in wrapping paper, packed them in suitcases and at 3:30 A.M. these suitcases were carried from the cabin by Tocco. Here the evidence stops.

Maugeri testified that on Saturday night, August 12th, he went to Pocoroba's cabin where he saw Poco-

roba, Tocco and Barri and had a drink with them; that he stayed there about six or ten minutes then went back to his concession (T. R. 171) where he remained until around a quarter to two (T. R. 172) after which he went home and to bed and did not get up until 7 or 7:30 on the morning of Sunday, August 13th. (T. R. 172.) There is no evidence in the record contradicting the testimony of Maugeri as to his activities after 11 P. M. on August 12th, except the testimony of Pocoroba that the voice that spoke from outside the door of his cabin at 3:30 on the morning of the 13th was that of Sam Maugeri (T. R. 38); that he did not see the person who spoke (T. R. 38, 79); that it might have been Maugeri's voice (T. R. 79); that it sounded like Maugeri's voice (T. R. 77.)

Assuming that the boxes contained opium, we come to the unalterable conclusion that the acts of Maugeri were but necessary incidentals to the ultimate transaction. Maugeri was accused and convicted of (a) concealing and facilitating the concealment of the opium and (b) facilitating the transportation of the same opium. Before the opium could be concealed it had to be possessed. Before the opium could be transported it had to be possessed. The concealment of the opium, whether by wrapping the tins in wrapping paper or putting them in the suit cases, was an incidental part of the transportation.

As the entire transaction, according to the Government's contention and evidence, consisted of the transportation of the opium from Santa Cruz to some other place, the acquiring possession of the opium and the

wrapping and packing of the opium were necessary and incidental to the ultimate act of transportation.

The cases are many and uniform that, under the facts disclosed, the offense committed, if any, was but one and could only be punished once.

The question of double jeopardy is not confined to a mere reading of the indictment or judgment. It is sufficient if such fact appear anyhere in the record.

> "It is true that in the case of Snow we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment or anywhere else in the record (of which the judgment is only a part), it is sufficient."
>
> *Ex Parte Nielsen,* 131 U. S. 176, 183, 33 L. ed. 118, 120.

The cases establishing that the facts herein prove but one offense for which only one punishment can be imposed follow:

> "It is, however, assigned for error that the court erred in imposing sentence on both counts of the information. In this we concur, and think that what the court did amounted to imposing a double sentence for a single offense. The same facts proved unlawful possession and unlawful transportation. The only act of possession testified to was the possession necessarily involved in the transportation which was the subject of the second count. The officer testified that he saw the defendant leave the hallway of a five-story tenement house with a package which contained six bottles of gin, which he deposited in his auto-

mobile. There is no evidence that the accused lived on the premises, and his own testimony was that his home was in Brooklyn, on Decatur street. The possession was necessary and incidental to the act of transportation. There may be, and commonly is, possession which is distinct from transportation.

"Possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses. But, where the only possession shown is that which is necessarily incidental to the transportation, the offense is single, and not double. (Citing cases.) And the law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and punished for an offense consisting of one or more of such incidents. To do so would be to inflict double punishment."

Schroeder v. United States (C.C.A. 2), 7 Fed. (2d) 60, 65.

In *Copperthwaite v. United States* (C.C.A. 6), 37 Fed. (2d) 846, defendant was charged in two counts: first, with the purchase and sale of unstamped morphine and secondly, with buying and selling the same amounts of morphine. The first count charged a violation of the Harrison Anti-Narcotic Act and the second count a violation of the Narcotic Import Statute. The appeals court held that defendant could not be punished under both acts, and, at page 847, states:

"When a single act is a violation of two laws, it may be penalized in each; but this conclusion

leads to an inquiry as to double punishment. *The same act may not be twice punished by the same sovereignty, merely because it violates two laws.* Identity, as to double punishment as well as to double jeopardy, is shown if the same evidence necessary to prove either offense will also necessarily establish the other and this relation is reciprocal (and perhaps even if not reciprocal); in other words, can either be shown without disclosing the other? Reynolds v. U. S. (C. C. A. 6) 280 F. 1, 2; Miller v. U. S. (C. C. A.) 300 F. 529, 534. When thus tested there was here double punishment. The entire proof in this case consisted of evidence that the defendants agreed to furnish and sell morphine to a purchaser and thereafter did have it (unstamped) in their possession and deliver it to him. By virtue of the presumption declared in the Harrison Act, this possession tended to show the forbidden purchase; and the same possession also tended—by virtue of the presumption declared in the Import Act—to show unlawful importation and defendants' knowledge. In such case the government may punish for either offense, but we think the supporting evidence does not so materially vary as to justify two punishments, merely because two inferences are attached by different statutes to the same evidential basis." (Italics ours.)

In *Morgan v. United States* (C.C.A. 4), 294 Fed. 82, defendant was charged with unlawfully manufacturing whisky, the unlawful possession of whisky and the unlawful possession of property designed for the manufacture of whisky. The Court held only one offense and not three had been committed, stating, at page 84, as follows:

"Conviction of the defendant on the charge of manufacturing moonshine whisky, under the facts of this case, necessarily embraced conviction of the offense of having in possession the same moonshine whisky, and the offense of having in possession property designed for the manufacture of moonshine whisky, charged in counts 1 and 2 of the same indictment. The act charged in count 3 included acts charged as crimes in counts 1 and 2. It follows that the sentence under counts 1 and 2 must be set aside, as was properly conceded by the United States Attorney."

The Appeals Court for the Sixth Circuit rendered the following opinion:

"It is next urged that sentences for the sale and for the possession constitute a double punishment for the same act. We think this contention is sound. The act of possession relied upon was merely the possession necessarily incidental to the sale which was the basis of the sale count. We considered this subject in Reynolds v. U. S., 280 Fed. 1. While there may be, and commonly is, possession without sale, so that possession for a substantial time, followed by a sale, might be two distinct offenses, in this case the only possession shown was that which temporarily came to Miller for the purpose of completing by delivery the sale which he was making. The same testimony which showed the sale necessarily showed the only possession which is shown at all."

Miller v. United States (C.C.A. 6), 300 Fed. 529, 534.

This Court has followed the foregoing rules in *Parmagini v. United States* (C.C.A. 9), 42 F. (2d) 721:

"With reference to Counts I and III, one for selling morphine and the other for distributing opium, the transaction was an entity, the delivery of the opium was a mere incident to the delivery of the morphine, and the transaction comes clearly within the rule stated by the Circuit Court of Appeals for the Eighth Circuit in the last mentioned case." (Referring to the case of *Bradin v. United States,* 270 Fed. 441, 443.)

The Supreme Court of California has applied the rules and reasonings of the foregoing cases and has ably summed up the manner of their application in a case where the defendant was charged in two counts with having a still in his possession and control and in unlawfully operating such still. We quote from a portion of the California Court's opinion:

"As early as *People v. Shotwell,* 27 Cal. 394, and *People v. Frank,* 28 Cal. 507, it was held that co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted as one offense. 'Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet when both are perpetrated by the same person, at the same time, they constitute but one

> offense, for which one count is sufficient, and for which but one penalty can be inflicted.' (Wharton on Criminal Law, approved in People v. Shotwell, 27 Cal. 394.)"
>
> *People v. Clemett,* 208 Cal. 142, 144.

The California Court then states the reasons why a statute, such as the one involved herein, containing several elements in the disjunctive should not be construed as inflicting a separate penalty for the doing of each element thereof:

> "All of the acts set out in the statute before us for construction are coupled with the disjunctive 'or', one of which or all of which joined constitute but one offense. * * *
>
> "The severity of the penalty for the violation of the provisions of the act, the maximum being five years' confinement in the state prison, and a fine of $5,000, is in confirmation of our construction. It was not the intent of the legislature that the several acts named in the statute before us should be split into several separate offenses for the purpose of imposing a penalty for the violation of each singly."
>
> *People v. Clemett,* 208 Cal. 142, 145-147.

In the case at bar we have but one statute in which all the acts set out therein are coupled with the disjunctive "or". Clearly Congress never intended that a person should suffer imprisonment for 70 years and be fined in the sum of $35,000 because he had unlawfully imported, received, concealed, bought, sold, facilitated the concealment and facilitated the trans-

portation of the same lot of narcotics in one continuous operation.

In *United States v. Adams,* 281 U. S. 202, 74 L. ed. 807, Adams, a bank officer, had previously been tried and acquitted for making a false entry in a book of the bank which imported a remittance of $75,000 to another bank to the credit of defendant. Subsequently Adams was again indicted for making a false entry in another book of the bank importing that he had made a deposit of $75,000 to his credit. Adams pleaded a former acquittal. The Supreme Court upheld the plea of former acquittal and in doing so stated:

> "* * * The two entries had reference to the same transaction, were based upon the same draft and were *the correlated means of accomplishing a single fraud,* if fraud there had been. The district court held that on its construction of Rev. Stat. §5209 * * * there could be but one prosecution for false entries based upon any single draft, even though several different entries were made in the different books of the bank, all relating to the same. Therefore it sustained the plea. The United States appealed.
>
> "It is a short point. The statute punishes any officer of a Federal reserve bank who makes any false entry in any book of the bank with intent, etc. The government contends for the most literal reading of the words, and that every such entry is a separate offense to be separately punished. But we think that it cannot have been contemplated that the mere multiplication of entries, all to the same point and with a single intent, should multiply the punishment in proportion to the

> complexity of the bookkeeping. The judgment in the case is affirmed." (Italics ours.)

Here it was not contemplated that the punishment should be multiplied for the doing of a series of acts, all to the same point and with the same intent, merely because it required more than one act to accomplish the ultimate design.

Maugeri was not charged either with the possession of narcotics or with the transportation of narcotics, a matter we will discuss in dealing with the insufficiency of the evidence; he was charged with concealing, facilitating the concealment, and facilitating the transportation of narcotics. If Maugeri's act of bringing the two boxes into Pocoroba's cabin at 11 o'clock was for the purpose of Tocco and Barri wrapping and placing the opium in the suitcases in order that it could be transported to some other place, then Maugeri's act was but one act and consisted in facilitating the concealment *and* transportation of the opium, an act that was a necessary incidental to the ultimate act.

Under the facts the sentence imposed on Maugeri—10 years' imprisonment and $5000 fine on Count I and 10 years' imprisonment and $5000 fine on Count II, said *sentences to run consecutively* (T. R. 17-18)—constitute double punishment and double jeopardy. The judgment and sentence on Count I should be set aside.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT EITHER THE VERDICT OF GUILTY OR THE JUDGMENT AND SENTENCE ON COUNT II OF THE INDICTMENT.

The assignment of errors filed herein specifies the foregoing points as follows:

> That the verdict is contrary to the evidence adduced at the trial here (Assignment of Error 1, T. R. 22).
>
> That the verdict is not supported by the evidence (Assignment of Error 2, T. R. 22).
>
> That the evidence adduced at the trial is insufficient to justify said verdict (Assignment of Error 3, T. R. 22).
>
> That said verdict is contrary to law (Assignment of Error 4, T. R. 22).
>
> That the trial Court erred in denying defendant's motion made at the close of plaintiff's case, for a directed verdict of acquittal on both counts of the indictment, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty. (Assignment of Error 9, T. R. 22-23).

Count II of the indictment charges the defendant with a violation of the *Jones-Miller Act,* the count reading in part as follows:

> "That on or about the 13th day of August, 1944, at the City of Santa Cruz, State of California, * * * said defendants fraudulently and knowingly did *facilitate the transportation* of a lot of smoking opium * * *." (T. R. 2.)

The *Jones-Miller Act* reads in part as follows:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall be fined not more than $5,000 and imprisoned for not more than ten years. * * *"
>
> 21 U.S.C.A. 174.

We emphasize to this Court the fact that Maugeri *was not charged* with either the possession or transportation of opium; he was charged with *facilitating* the transportation of the opium. This Court has held that possession is not an element of the offense prescribed in the Jones-Miller Act (see *Pon Wing v. United States* [CCA-9], 111 F. (2d) 751, 758) and by a parity of reasoning and the absence of such wording in the Act, transportation is not an element of the offense. Possession and transportation constitute a violation of the Harrison Narcotic Act, but not of the Jones-Miller Act.

This Court has also defined the meaning of the word "facilitate" as used in the Jones-Miller Act:

> "Anything done to make the continuance of the trip 'less difficult' would constitute facilitation of its transportation. Since the term 'facilitate' seems not to have any special legal meaning, the framers of this statute must have had in mind the

> common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task'."
>
> *Pon Wing v. United States* (CCA-9), 111 F. (2d) 751, 756.

So, the phrase "transport opium" necessarily means something different from "facilitate the transportation of opium". One can facilitate such transportation without actually transporting the article. One can transport an article without doing anything to facilitate such transportation.

There is nothing in the record to show that Maugeri did any act that "facilitated" the transportation of the opium or, to use the language of this Court, Maugeri did nothing that rendered the movement of the opium "less difficult", or that operated to "make easy", or which acted to "free from difficulty or impediment" its transportation.

We have set forth above the facts relating to the night and morning of August 12th and 13th and discussed the sequence of events as disclosed by the record. All of these matters show but one continuous transaction in which each act of Maugeri was merely to bring about a concealment of the opium (if the Government's witness is believed and its theory adhered to). None of these acts "facilitated" in any manner the subsequent transportation of the opium.

In fact, if Maugeri had been charged with transportation—either as one directly performing that act or as aiding and abetting therein—the evidence would not have established guilt on his part.

For the foregoing reasons the judgment and sentence on Count II of the indictment should be set aside.

Dated, San Francisco,
May 18, 1945.

Respectfully submitted,
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